Supreme Court, U.S.
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No. 2010

IN THE
SUPREME COURT OF THE UNITED STATES

FRANCIS OSEI-AFRIYIE,
Petitioner,

v.

STATE OF NEW JERSEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW JERSEY SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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Pro-se Petitioner

QUESTIONS PRESENTED

1. Is an individual's Fourteenth Amendment right to the equal protection of the laws violated where the State is permitted to misapply the law?
2. Is a defendant's Sixth Amendment right to confront a witness against him or her violated where an untrained person is allowed to substitute for a trained and qualified Alcotest operator without an expressed waiver?

LIST OF PARTIES

Petitioner:

FRANCIS OSEI-AFRIYIE

Respond

STATE OF NEW JERSEY

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ORDERS AND OPINIONS BELOW

The Order of the Supreme Court of New Jersey is at Appendix A. The Opinion of the same Appellate Division is at Appendix B. The Order of the New Jersey Superior Court (Appellate Division) is at Appendix C. The Letter Opinion and Order of the New Jersey Superior Court (Law Division) is at Appendix D. The transcript from the de novo trial at the Law Division is at Appendix E. An excerpt from the July 16, 2008 municipal court hearing is at Appendices F. The municipal court transcripts from the September 11, 2007 hearing is at Appendix G.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257. The New Jersey Supreme Court entered an Order on January 26, 2010 denying petitioner's petition to certify the opinion of New Jersey Superior Court (Appellate Division). The Order was filed on January 28, 2010 and is final as to the questions presented in this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section I of the 14th Amendment states, in pertinent part that:

"*...No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.*"

The Sixth Amendment states, in pertinent part that:

"In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..."

42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage , of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Federal Implied Consent Law: 18 U.S.C. § 3118 provides:

"Whoever operates a motor vehicle in the special maritime and territorial jurisdiction of the United States consents thereby to a chemical test or tests of such person's blood, breath, or urine, if arrested for any offense arising from such person's driving under the influence of a drug or alcohol in such jurisdiction. The test or tests shall be administered upon the request of a police officer having reasonable grounds to believe arrested to have been driving a motor vehicle upon the maritime and territorial jurisdiction of the United States while under the influence of drugs or alcohol in violation of the laws of a State, territory, possession, or district."

The New Jersey "Implied Consent Law," N.J.S.A. (39:4-50.2) provides:

" Any person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of

samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood provided, however, that the taking of samples is made in accordance with the provisions of the act and at the request of a police officer who has reasonable grounds to believe that such a person has been operating a motor vehicle[while under the influence of an intoxicating liquor, narcotic, hallucinogenic, or habit-forming drug]. [N.J.S.A. 39:4-50.2(a)].

STATEMENT OF THE FACTS RELEVANT TO QUESTIONS PRESENTED

Petitioner(P) was arrested on May 28th, 2007 and charged with five counts including refusing to submit to a breath test, N.J.S.A. 39:4-50.2 and driving while intoxicated, N.J.S.A. 39:4-50. On September 11, 2007, P appeared with counsel at a hearing at the Carney's Point municipal court in New Jersey. Except the refusal charge, the prosecutor recommended the dismissal of all the other charges particularly due to P's medical problems. P pled guilty to the refusal charge because of what the municipal court told him refusal amounted to and the court accepted the guilty plea:

"THE COURT: And do you agree that you did not give a full enough sample of your breath in order to register a proper reading?

DEFENDANT: Yes.

THE COURT: And that, therefore, that amounts to a refusal.

DEFENDANT: Yes.

THE COURT: All right. Based on that, I will accept the guilty plea. See, P's appendix (P.app.) 72.

Applicable fines and sentence were imposed but suspended pending the New Jersey Supreme Court's decision in State v. Chun. 94 N.J.158 (2008). The holding in that decision included:

"**Charging an arrestee with refusal remains largely within the officer's discretion.**" See, p.10.

After that decision, petitioner reappeared at the municipal court on July 16, 2008 with his attorney. This time, defense counsel made an application to withdraw P's guilty plea because: 1) the Alcotest operator opined with the arresting officer, who was aware of P's medical conditions at the time of the test, that P was unable to provide the required breath sample and 2) the operator abused his discretion in stopping the test after only two tests despite P's medical problems. The motion was denied and the judge re-imposed the sentence. At the hearing though, the State called the arresting officer instead of the Alcotest operator who administered the breath test to testify. His testimony included, in the main, how the Alcotest machine works (P.app.60,61).

Petitioner appealed pro se at the New Jersey Superior Court (Law Division), contending, among others, that (1) **his guilty plea was involuntary and unknowing because the trial court misinformed him about the New Jersey Implied Consent Law (P.app.35-36) and (2) that the rights he is guaranteed under the 6th and 14th amendments to the United States Constitution had been violated** (P.app.9,39,42). At the Law Division though, the judge acknowledged that the municipal judge had

misinformed P about the law, determined that that was an issue in the case and promised to "consider and address" it:

MR. AFRIYIE: But what the standard of review is...whether or not the judge applied the law correctly that is an interpretation of the law...and that is what I'm asking this Court to do.

THE COURT: Okay.

MR. AFRIYIE: So what I have said pinpoint the fact that he misinterpreted the law.

THE COURT: Okay. I understand that. You are correct. Pet.app.37

THE COURT: And, Mr. Afriyie raises the issue that his waiver of the trial was based on insufficient information, improper information, so forth. It is mind- - *I'm mindful of course that he had an attorney present who- - with whom he perhaps should have conferred on that... He had counsel with him, but I'm limited to the record below and I'll consider it again carefully of course*..... Pet.app.56

MR. AFRIYIE: ***What about the Judge's interpretation of the New Jersey Statute where it says that given (sic) insufficient breath will amount to refusal?***

THE COURT: ***This is an issue in the case...Whether you're giving an insufficient volume is tantamount to a refusal is an issue in the case, and that point you raised, and I'll address that...*"** P. app.57. Emphasis added.

That court failed to honor its promise to the parties. At the same time the court made the following finding:

"THE COURT: "With regard to your question concerning doubt, yes, the doctor's reports did inject I would suppose, without question some doubt into the refusal issue..." P.app.55.

Nevertheless, P was found guilty and the fines and the sentence were re-imposed. P again filed an appeal with the New Jersey Superior Court (Appellate Division), essentially making the same arguments and additionally requesting the court to carefully review the Law Division's findings and unfulfilled promise (i.e.unfinished business) and make a determination. That court failed to honor the request but affirmed the Law Division's decision by concluding:

"We have fully considered the arguments raised on appeal. Having done so, we affirm defendant's conviction and sentence, substantially for the reasons expressed by Judge Forester's letter opinion of November 7, 2008." P.app.9, and "Defendant's remaining legal and constitutional arguments lack sufficient merit to warrant discussion." P.app.12

P then filed a motion for reconsideration. The motion was denied in part and granted in part.P.app.13. Finally, P filed a petition for certification with the Supreme Court of New Jersey raising the same constitutional and statutory questions for a review. The petition was denied on January 26, 2010 and filed at the Clerk's office on January 28, 2010. P.app.1. This Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED TO CORRECT SANCTIONING THE DENIAL OF EQUAL PROTECTION OF THE LAW BY THE NEW JERSEY SUPREME COURT

Petitioner appeared for a hearing on 9/11/2007 at the municipal court in Carneys Point. See, P.app.67-73. What happened at the hearing included:

THE COURT: And did they take you to Moorestown

Barracks and request that you take a breath test?

DEFENDANT: YES.

THE COURT: And do you agree that you did not give a full enough sample of your breath in order to register a proper reading?

DEFENDANT: Yes.

THE COURT: And that, therefore, that amounts to a refusal.

DEFENDANT: Yes.

THE COURT: All right. Based on that, I will accept the guilty plea. I find it's voluntary and there is a factual basis. I'll stay the sentence pursuant to Chun. The sentence is a $306 fine, $33 costs, $100 DWI surcharge, 210 days revocation of the driving privileges, and twelve hours minimum mandatory attendance IDRC. The other charges are dismissed."

P was made aware that the other charges were dismissed because of medical problems and not due to any unsubstantiated and asserted negotiated plea agreement:

"THE COURT: So you're moving to dismiss the 4-50 and other charges?

MR. HATHAWAY: That's right. Yes. And - - and particularly in light of defendant's- -

...

MR. HATHAWAY: - - problems that are shown in the doctor's reports." P.app.71.

The New Jersey "Implied Consent Law," N.J.S.A. (39:4-50.2) provides:

" *Any person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood provided, however, that the taking of samples is made in accordance with the provisions of the act and at the request of a police officer who has reasonable grounds to believe that such a person has been operating a motor vehicle[while under the influence of an intoxicating liquor, narcotic, hallucinogenic, or habit- forming drug]." [N.J.S.A.39:4-50.2(a)].*

Under the above statutory scheme, a defendant who does not provide enough breath sample to register a proper reading is not automatically guilty of violating N.J.S.A. 39:4-50.2. That needs to be proven in a trial. To secure a conviction under the statute, the State must prove all the elements of the violation, including " that defendant refused to submit to a breathalyzer test." State v. Wright, 107 N.J. 488, 490 (1987). The burden is on the State to prove refusal to take a breathalyzer test beyond a reasonable doubt; and if all the elements of the violation are not established, no conviction shall issue. State v. Cummings, 184 N.J. 84, 95 (2005), 875 A. 2d 906.

More specifically, implied consent statutes provide that any person who is arrested for driving while under the influence of alcohol has an affirmative obligation to submit to a breathalyzer test. The statutes' purpose is to encourage motorists suspected of driving under the influence to submit to breathalyzer tests. State v. Wright, ibid. A defendant is required by law to give "a valid sample." This is defined as two samples, **and not two tests**, that differ no more than 0.02. A greater difference requires repetition until a valid sample is collected. But as reflected in Special Master, Judge King's Report, Findings of Fact and Conclusions of Law Submitted to the New Jersey Supreme Court: February 13, 2007, that Remand Court held:

> In instances where a defendant is tested on an Alcotest 7110 and there is no reportable breath test value on the AIR for that defendant, the AIR must clearly show the source and the reason why no breath test result was reported for that sample. This non-reportable test event in itself shall not constitute a legal determination of refusal to submit to chemical breath testing under the implied consent statutes. p. 233, item (e).

Further, according to Sgt. Kevin M. Flanagan's expert testimony before Judge King in Chun, the Alcotest 7110 allows the operator eleven attempts at collecting ***two valid breath samples***.

> "After the eleventh attempt, the instrument gives only two options: (1) terminate; and (2) refused. At that point, the operator does not necessarily have to charge refusal. For example, if a subject has made several unsuccessful attempts, **the operator can choose to terminate the test and give an opinion that the subject was not capable of providing a proper sample.**" Ibid., at 114-15.

Alcotest Program and he had trained 5,000 operators by 2007.

In recognition of these facts, the New Jersey Supreme Court in Chun, id., stated:

> The minimum breath volume is significant, in and of itself, because the Alcotest is programmed to determine whether the four minimum criteria have been met in a precise order, the first of which is volume analysis. A sample that falls short of the currently required 1.5 volume measurement will be found to be unacceptable. In that event, the Alcotest will report the amount of air delivered and will display an error message which reads: "minimum volume not achieved." The Alcotest permits up to eleven attempts to collect two samples, after which, the only options that the device offers are "terminate" or "refusal." If the operator chooses terminate, the Alcotest will reset and the subject can then be given the opportunity for eleven more attempts. If the operator chooses "refusal," the test sequence ends, but the operator is not required to issue a summons for refusal. N.J.S.A. 39:4-50.4a. **Charging an arrestee with refusal remains largely within the officer's discretion**." (quoting State v. Widmaier, 157 N.J. 475, 724 A.2d 241 (1999). Hence, N.J.S.A. 39:4-50.2 is not a per se violation.

The New Jersey Superior Court (Law Division) totally agreed with the retired Michael King, J.A.D. as indicated above, P.app.37,56,57 or p.5 of brief, but failed to honor its own promise made to the parties, Pet.app.15-23. P had asked the appellate court to review the unfulfilled promise but it failed to do so, Pet.app. 2-12.

The courts below conveniently ignored the critical issue and indeed did not give it any consideration. P believes that when a defendant requests that the appellate court review

The courts below conveniently ignored the critical issue and indeed did not give it any consideration. P believes that when a defendant requests that the appellate court review an unfulfilled promise made by the Law Division, that court must examine the record if the evidence presents a rational basis for such a request and make a determination or act upon it. Where no such request has been made by a defendant, the court must determine independently whether the evidence "clearly indicates" it is appropriate to do that especially when it is about a question of law even if at odds with the strategic considerations of counsel. **Therefore, in view of the fact that the appellate court ignored P's request to review the Law Division's postponed but unfulfilled promise "to consider and address" the trial court's interpretation of the New Jersey Implied Consent Law raised above, there is no question that the review process undertaken by the appellate court was applied differentially or in a discriminatory manner.** That court simply "rubber-stamped" the Law Division's unfinished or delayed business by acceding to the contents of its letter opinion. It concluded:

"... we affirm defendant's conviction and sentence, substantially for the reasons expressed in Judge Forester's letter opinion of November 7, 2008" but shockingly and inexplicably it ignored what Judge Forester acknowledged and promised, pp.6-7.

In the American judicial system, the function of the reviewing court is to determine whether adequate, substantial, credible evidence exists on the record to support findings of fact and to correct any errors of law. State v. Clarksburg Inn, 375 N.J. Super. 624, 639 (App.Div. 2005); Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). Questions of law are reviewed de novo. McDonalds v. Fountain, 2007 WL 3262211 (Del. Super. 2007) *1. And the reviewing court owes no particular deference to the legal conclusion of the trial court or Law Div., Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan ,

140 N.J. 366, 378 (1995). In order words, the law is the law and it is reviewed for proper interpretation and application. This too was not done here and the conviction required a reversal.

The implied consent law, as stated above, does not mandate that not providing adequate breath sample to register a proper reading is tantamount to a violation and is thus not a per se violation. In no published case decided by this Court, by the New Jersey Supreme Court, by the trial level courts, nor by any court in the United States for that matter has it been held that not producing enough sample of breath to register a proper reading constitutes a legal determination to refusal. Petitioner was, therefore, denied his right to the equal protection of the laws guaranteed to all citizens.

> "[W]here an important personal right is affected by governmental action, *the New Jersey Supreme Court*) often requires the public authority to demonstrate a greater "public need" than is traditionally required in construing the federal Constitution. Specifically, it must be shown that there is an "appropriate governmental interest suitably furthered by the differential treatment." Chun, Ibid.

This was not shown here but the Equal Protection Clause of the United States Constitution mandates that no state shall" deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const.* amend. XIV, § 1. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., Inc. 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d. 313, 320 (1985).

By denying the P's petition for certification despite its own holding (**Charging an arrestee with refusal remains largely within the officer's discretion**", (p.10), and despite the holding by its remand court, (p. 9), the New Jersey highest Court effectively sanctioned the conclusion that any defendant who could not give adequate breath

volume is automatically guilty of violating N.J.S.A. 39:4-50.2. In order words, the Court equated the refusal statute with the per se violation of N.J.S.A. 39:4-50(a) at a "blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood" as had been established by the New Jersey Legislature. However, since the Legislature had included the per se violation in its DWI statute, N.J.S.A. 39:4-50(a), it can be reasonably concluded that the same Legislature consciously and intentionally excluded it in the refusal statute Regardless of one's views as to the wisdom of the statute, the role of a judge is limited to applying the statute objectively and not revising it. "A court may not engraft upon a statute language which has been clearly excluded therefrom." In re Adoption of Swanson, 623 A. 2d 1095, 1097 (Del. 1993). . The Latin rule of statutory construction states, "Expressio unis est exclusion alterius" ("The expression of one thing is the exclusion of another"). Where the Legislature excluded " a non- non-reportable test event as a per se violation to submit to chemical breath testing under the implied consent statute, it is reasonable to conclude that the Legislature was aware of the omission and intended it. This intended omission "is the best evidence of a legislative policy" against implying that a non-reportable test event amounts to a legal determination of refusal to submit to chemical breath testing under the implied consent statutes enacted throughout the United States. Id. at 1097; see , Guiricich v. Emtrol Corp., 449 A. 2d 232, 238 (Del. 1982). ("The courts may not engraft upon a statute language which has been clearly excluded therefrom by the Legislature."); see also, American Fed'n of State, County & Mun. Employees v. State, 293 A.2d 567, 570 (Del. 1972) (If it was the intent of the legislature to include a provision in a statute, "the Legislature could have and, in our opinion, would have, simply specified" the provisions). **Therefore, any change in N.J.S.A. 39:4-50.2, either addition or deletion would**

require a statutory amendment which has not been made.

In 1989, Supreme Court Justice Brennan, in writing the minority dissent on the DeShaney case, spoke well to the gravity of injustice that would be perpetrated by that decision. "My disagreement with the Court," Justice Brennan wrote, "arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it." DeShaney v. Winnebago County, 489 U.S. 189 (1989). Therefore, no human right can be secure when the protection of that right is left to the arbitrary whims and discretion of those in power.

The text and history of the "equal protection of the laws" embodied in the Fourteenth Amendment manifested both a promise and a command. As a promise, it was to extend to all persons; as a command, it forbade denials of equal protection, imposing an obligation on the states to refrain from invidious discrimination and to ensure that state laws were administered with actual equality, rather than the sham represented here by adding to the law and ignoring a request to review an unfulfilled promise by a court.. Finally, it is noted that history indicates that to secure this promise and to enforce this command, Congress was necessarily vested with the affirmative power to enact comprehensive legislation preventing or remedying state denials of equal protection.

Section 1 of the Fourteenth Amendment commands that no state shall "deny equal protection of the law," and "when equal protection is withheld, when it is not afforded, it is denied." Cong. Globe, 42d Cong., 1st Sess. 505 (1871) (statement of Sen. Pratt). As a necessary consequence, the clause gave rise to an affirmative duty on the part of the states: they are obliged not merely to refrain from unequal treatment, but they are obliged to provide "equal protection." A state denies equal protection where it fails to

give it. Denying includes inaction as well as action. Id. at 501 (statement of Sen. Frelinghuysen).

How can one object to the result reached by the appellate court in this case? One only needs to look at (1) the decisions by other courts in the U.S, (2) the February 13, 2007 holding by Judge Michael King at the Remand Court in Chun, pp.13-14, (3) Judge Forester's acknowledgement of the trial court's misinformation provided to P to get a guilty plea, pp.6-7, and (4) his finding that it was doubtful whether P refused to take the test given his medical problems:

"THE COURT: "With regard to your question concerning doubt, yes, the doctor's reports did inject I would suppose, without question some doubt into the refusal issue..." P. app.6,55.

Under no set of circumstances can any driver replace, relive or retrieve the months of the right to drive that are forever lost and continue to be lost. The loss of driving privileges cannot be replaced, and such loss is inapposite to property deprivation which property can be replaced, in same or like kind. A citizen's loss of his or her fundamental liberty right to drive without due process causes irreparable harm.

In South Dakota v. Dole, 483 U.S. 203 (1987), United States Supreme Court considered federalism and the power of the United States Congress under the Taxing and Spending Clause. The Court, in a 7-2 decision authored by Chief Justice William Rehnquist, concluded that Congress has power under the Taxing and Spending Clause to impose conditions in its spending. But, Congress's conditional spending is subject to four restrictions:

1. The condition must promote "general welfare;"
2. The condition must be unambiguous;
3. The condition should relate "to the federal interest in particular national projects or programs;" and

4. Congressional condition of highway funds is merely a "pressure" on the state to comply, not a "compulsion" for Congress to avoid running afoul of the Tenth or Twenty-First Amendment.

Under the above Clause, the federal government currently funds grants to states that implement certain DUI prevention programs. As a direct result, many states including New Jersey, have implemented implied consent laws in their DWI statutes for both failure of a chemical test and refusal to take a test. States that do not comply with the law will lose a portion of their federal highway funds. Hence, withholding federal highway funds encourages states to adopt federal laws. If a state does not want federal highway money, then they can let arrested drunk drivers go without taking the breathalyzer test.

Receiving federal funds and implementing federal DWI programs would clothe such states with federal action. Consequently, discrimination by them and other conduct would be subjected to constitutional constraints because the federal government was involved either through coercion or encouragement. Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982).

In the instant case, the respondent receives federal highway funds and has implemented programs as a result. See 18 U.S.C. § 3118 and N.J.S.A 39:4-50.2. 18 U.S.C. § 3118 does not provide that a defendant who does not provide the required breath volume to activate a breathalyzer machine is automatically in violation of the law without any evidence. Neither does N.J.S.A 39:4-50.2 as previously analyzed. Under the circumstance then, petitioner's right under the Fourteenth Amendment of equal protection of the laws was violated.

Next, the State and the Appellate Division rely on State v. Geller, 348 N.J. Super.359, (Law Div. 2001) to support the proposition that P's subsequent actions after he had agreed to take the breadthalyzer test constituted a refusal.

As P argued in New Jersey courts, this was irrelevant as to whether the trial court properly construed the law in order to get a guilty plea. He responded nevertheless. That reliance is misplaced because there were distinguishing factors. In the Geller case, although the defendant agreed to take Breathalyzer test, he had no medical problems, was defiant and overly hostile. He also purposely did not blow sufficient air into the mouthpiece during the first five tests even after he had received warning instructions from the officer and been cautioned. The municipal judge concluded that the defendant was "out of control" and "confrontational" and that "his anger and agitation clouded his overall judgement and conduct ...in taking these tests." Finally, he said, "I believe that he intentionally was giving improper samples. I think he was doing it to, frankly, aggravate the Lieutenant. He was...playing games..." and concluded that defendant's conduct constituted a refusal. Viewed in the context of the entire episode, the Superior Court also concluded that defendant's failure to give a sufficient breath sample despite five attempts was part of his pattern of belligerence rather than a result of inadvertence, misunderstanding, accident or physical inability." and affirmed. This case does not help respondent.

Interestingly, none of the conduct attributed to Mr. Geller was exhibited by P. On the contrary, P had medical problems (esophagitis for which he had received two operations, throat/laryngeal pain, throat irritation and cough) that affected his ability to perform deep exhalation. He was and still is a stroke victim. Indeed, at the Law Division hearing, the court doubted the refusal:

THE COURT: "With regard to your question concerning doubt, yes, the doctor's reports did inject I would suppose, without question some doubt into the refusal issue..." p. 15 of brief and P.app. 6, 55.

The State did not give a rebuttal on the medical reports. But reasonable doubt comes from evidence and from lack of evidence.

P cooperated fully to give breath samples. Nowhere in his written reports did the trooper state on the day of the test that P was uncooperative in giving breath samples. . The operator never expressed the perception that P "was purposely refusing to blow sufficient air into the device". On the contrary, after the second failed attempt, he ceased the testing process and concurred with the arresting trooper that P was **unable** to provide valid samples. See P.s Appendix F.

Q. You indicated in your report – I believe you prepared the report that Mr. Shusted put into evidence that you determined that the defendant was unable to give a breath sample to the trooper. You included that in your report, correct?

A. Yes

Q. What - - allowed you to make that determination? What did you base that determination upon?

A. That was based on my- - sergeant at the time gave the Alcotest. He gave two samples that didn't meet the liters required to equal a positive test. The machine automatically shuts you off.

Q. All right. And in your report here, you don't have any notations saying that Mr. - - the defendant here was faking in regards to trying to give the sample?

A. In my report, no.

Q. All right. And it's also fair to say that your report, which we admitted into evidence as D-6, when you make the

discretionary call for the refusal, your very words say he is unable to do so.

A. Correct.

The plain meaning of the word "unable" in Merrian Webster's Collegiate Dictionary, 10th edition, means incapable and that of refusal means denying. Since the operator concurred with the trooper at the time he gave the tests that P was unable to give the required breath, he contradicted himself by punching refusal on the Alcohol Influence Report that P refused the test. The two are inconsistent (i.e. incapability versus refusal).

II. REVIEW IS WARRANTED TO CORRECT SANCTIONING THE VIOLATING OF PETITIONER'S CONSTITUTIONAL RIGHTS BY ALLOWING THE STATE OF NEW JERSEY TO SUBSTITUTE ANOTHER PERSON AS WITNESS INSTEAD OF THE ACTUAL ALCOTEST OPERATOR

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690 106 S.Ct. 2142, 90 L.Ed. 2d. 636 (1986), quoting California v. Trombetta, , 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). **This "meaningful opportunity" is guaranteed to occur <u>not only</u> in a trial involving rights of confrontation but rather in all criminal prosecutions.**

Petitioner did not waive this right

The New Jersey Supreme Court has established its own Guidelines with respect to negotiated pleas (i.e. plea bargains) in the Municipal Courts. Plea bargains in the Municipal Courts are governed initially by *R.* 7:6-2(d), but supplemented by "Guidelines for Operation of Plea Agreements" in an Appendix to Part V II of the Rules Governing the Courts of the State of New Jersey. (See Office of the Attorney General of the State of New Jersey, Attorney General Guideline: Prosecution of DWI & REFUSAL violations, January 24, 2005.

The Municipal Court Guidelines, however, contain certain limitations with respect to the disposition of DWI and DWI refusal offenses. The relevant provisions of the Limitations, as set by the Supreme Court are as follows:

Guideline 4. Limitation

No plea agreements whatsoever will be allowed in drunken driving or certain drug offenses.

A. Driving while under the influence of liquor or drugs (*N.J.S.A.* 39:4-50)

If a defendant is charged with driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and refusal to provide a breath sample (N.J.S.A. 39:4-50.2) arising out of the same factual transaction, and **the defendant pleads guilty to the (N.J.S.A. 39:4-50) offense, the judge, on recommendation of the prosecutor, may dismiss the refusal charge.**

Nothing contained in the above sentence allows the judge to accept a plea agreement to dismiss a DWI charge. As the language of Guideline 4 makes clear, the Court

specifically permits the dismissal of the refusal charge where the defendant is also charged in connection with DWI offense arising from the same incident, and not vice versa. Therefore, dismissing the DWI charge would have run afoul of the Supreme Court's guidelines. It is noted that although the general ban on plea bargaining was lifted in 1988, the Supreme Court preserved the ban on plea bargaining drunk-driving cases. " State v. Hessen 145 N.J. 441, 448-49 (1966). The Court did so because of the strong public policy supporting strict enforcement of drunk-driving laws. The committee that generally endorsed plea bargaining excluded drunk-driving in view of "the extraordinary emotional and fiscal costs of drunk driving and 'the public's concern that the process of plea bargaining, as applied to alcohol and drug offenses, might undermine the deterrent thrust of New Jersey's tough law in these areas.'" Id. at 449 (quoting Supreme Court Committee to Implement Plea Agreements in Municipal Courts, Final Report at 28). **Hence, this case deserves a review by this Court because it involves a significant public policy.**

Additionally, according to the New Jersey Supreme Court Plea Agreement Guidelines as adopted 7-28-2004, effective 9-1-2004, in any situation where a prosecutor in a Municipal Court proceeding intends to engage in plea bargaining, subject to the Limitations imposed by the Supreme Court, the prosecutor must consider other obligations associated with plea negotiations. First, and foremost, the prosecutor **MUST PLACE ON THE RECORD** the terms and conditions of any plea agreement. Second, the prosecutor must adhere to the requirements of R. 7:6-2(d) (3) that the complaining witness (police or law enforcement officer, or private citizen) and the victim are present in court, and have been "consulted about the agreement."

Here, since there was no agreement, there was nothing on the record about the terms and conditions of any

"purported plea agreement" and the complaining witness (the police officer) was not in court on 9/11/07. It is, therefore, reasonable to conclude that he may not have been consulted about a non-existent agreement. The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial and credible evidence. See, e.g., Pascale v. Pascale, 113 N.J. 20, 33, (1988) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974). However when, as here, there is nothing in the record to support the conclusions of the lower courts, the resulting Order based on "negotiated plea" P.app.11) cannot stand and should not be allowed to hold. The lower courts adopted respondent's unsubstantiated position of "negotiated plea agreement" despite petitioner's position to the contrary. Indeed, due to the fact that (1) the trial judge misinformed P about the law and (2) P had no knowledge of a plea agreement, never signed any agreement and was not informed about any agreement, he contested every fact relating to the issue of pleading guilty **voluntarily** on appeal, brief, p.4. The other charges were dismissed because of P's medical problems. P.app.11-12. Petitioner, therefore, never waived his right to confront his witnesses.

The doctor's medical reports that Mr. Hathaway, the prosecutor, mentioned included a report from Dr. Robert Varipapa. In his report he stated:

> " Please be informed that this patient has a history of cerebravascular disease. Specifically, the patient had a right inferior cerebellar cerebrovascular accident in 1998 which was documented with MRI studies. His last MRI scan was in 2004 which showed multiple areas of increased signal, including involvement of the right cerebellum, compatible with cerebrovascular disease. Considering the patient's history of cerebrovascular disease, he would be precluded from the typical testing used for driving while under intoxication, such as tandem walking and other coordinating acts..."

Two other doctors also summarized their opinions as stated at P.app.6. These medical opinions ares consistent with Chun. Therein, the court stated that deep lung air is needed to get most accurate analysis, otherwise the machine would reject the sample because it would not achieve a plateau. That Court concluded:
'Therefore, we can be certain that all test subjects, regardless of age and gender, will only achieve *valid* sample when the deeper lung air is included. Chun, pp.57-61.

CONSTITUTIONAL RIGHTS VIOLATED

P had argued at the Law Division (Pet. App.32), at the appellate Division ((Pet. App.32) and again in his petition to the Supreme Court that any prosecution based on evidence submitted by a witness whom defendants are not permitted to cross examine and understand is a violation of due process under the Fourteenth Amendment of the United States Constitution and Article 1, paragraph10, of the New Jersey Constitution. Also, he had argued that the substitution of the arresting trooper for the Alcotest operator violated his Sixth Amendment right to confront a witness against him since the Supreme Court in Chun had ordered that:
"...in all pending prosecutions based on or including Alcotest New Jersey Firmware version 3.11 and all future versions, and consistent with past practices in prosecutions based on breathalyzer analysis,
The operator who conducted the tests shall be made available to testify and shall produce the documents evidencing his or her training..." and further said "... In matters relating to the Alcotest, the same general considerations that gave rise to the requirements must, of course, apply. Chun, Id. at 81.

The Law Division responded this way in its opinion letter:

The Law Division responded this way in its opinion letter:

" The test operator did not testify, nor did he provide his qualifications. Instead, the arresting officer who witnessed the operation of the Alcotest testified. D did not get the opportunity to cross- examine the operator. Furthermore, the three core foundational documents were not entered into evidence. However, D has only raised these issues on appeal. They were not discussed in the Municipal Court. Therefore, remanding the case for further fact finding would be improper." P.app.23.

The Appellate Division also said this in its opinion:

"With respect to the so-called 'foundational documents' identified in Chun, supra, at 134-45, and the State's non-production of the Alcotest operator at the plea withdrawal hearing, we sustain the denial of relief to defendant for several reasons. First, defendant did not raise this argument in municipal court. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229 (1973). Second, the post-Chun proceeding in the municipal court was not a trial involving rights of confrontation but rather a post-sentencing hearing on an application to withdraw a guilty plea." P.app.12.

The New Jersey Supreme Court also denied P's petition for certification. By denying the certification, the New Jersey Supreme Court may well have violated the petitioner's right. This constitutional claim calls into question the accuracy of determining P's guilt or innocence upon the scrutiny of the alcotest operator's testimony. Without such information, no Court could determine whether or not P was a victim of miscarriage of justice in this aspect of the case.

By denying the petition for certification, the New Jersey Supreme Court also failed to require compliance of its own order in Chun.

Again, as P argued in his appellate brief and in his petition the New Jersey Supreme Court, the trial court's misapplication of the law would affect any driver (millions to say the least) who would be arrested on New Jersey roads and charged under N.J. 39:4-50.2 and who would be unable to provide a valid breath sample to register a proper reading irrespective of the cause. As such, this case is a matter of substantial public interest and an appellate court will consider it even if it was not raised below. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). This Court should, therefore, review this case.

In a concurring statement in Murray v. Carrier, 477 U.S. 478, 498-99, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986),. Justice Stevens, stated:

"By denying these motions, the trial court significantly curtailed the defendant's ability to cross-examine the prosecution's most important witness, and may well have violated the defendant's right to review 'evidence favorable to an accused upon request--- where, the evidence is material either to guilt or to punishment.'" Id., quoting Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed. 2d. 215 (1963). ... "That right is unquestionably protected by the Due Process Clause." Id. "Indeed, the Court has repeatedly emphasized the fundamental importance of that federal right." Id. "[T]he requirement of due process [is] to ensure that a miscarriage of justice does not occur."Id.

"The principle...is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." Id. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Id.

Justice Stevens continued:

"The constitutional claim advanced by respondent calls into question the accuracy of the determination of his guilt. On the record before us, however, we cannot determine whether or not he the victim of a miscarriage of justice. Respondent argues that the trial court's analysis was severely flawed ... Even if the trial judge applied the correct standard , the conclusion that there was no "exculpatory: material in the victim's statements does not foreclose the possibility that inconsistencies between the statements and the direct testimony would have enabled an effective cross-examination to demonstrate that respondent is actually innocent.... On the other hand, it is possible that other evidence in the record is so overwhelming that the trial judge's decision was clearly not prejudicial to the defendant. The important thing is that we cannot evaluate the possibility that respondent may be the victim of a fundamental miscarriage of justice without any knowledge about the contents of the victim's statements. Murray v. Carrier, 373 U.S. at 499.

In the instant case, the trial court not only misinformed P on the law, but also permitted trooper Cresong to be substituted for the operator as a witness. **He testified that it was the Alcotest operator who used his discretion to** (1) stop the Alcotest machine after the second test, (2) indicate on the AIR that P had refused to take the test and (3) inform him that **P was unable** to give the required volume of breath. Again, he testified that he (1) subsequently issued a refusal ticket based upon what the operator had stated on the AIR; (2) determined that, based upon the operator, the defendant was unable to give a breath sample to the trooper; (3) could not determine on his own whether P was unable to give or was refusing to give valid breath sample. "I can't make that determination." Despite this testimony, the trooper had previously prepared a report on what occurred at the test station on the day of the event as indicated below:

At the Station or Other Location:

"The defendant was read the DMV Standard Statement and asked if he would submit to a breath test at which time he stated "Yes". Sgt. E. Smith #4924 then attempted to administer two breath tests to the defendant utilizing the Alcotest. The defendant was given ample opportunities to provide a sufficient breath sample but was unable to do so. The defendant again was read his rights as per Miranda prior to being asked the questions on the Drinking Driver/ Operator questionnaire in which he answered."

Nowhere in the written report did the trooper state on the day of the test that P was uncooperative in giving breath samples or P did not try to give valid breath samples. Indeed, on the test date, the trooper explicitly stated that, D was unable to give a valid breath sample after "concurring with Sgt. Smith", the Alcotest operator.

Here, for instance, the trooper testified that the machine shuts off automatically if an arrestee provides two invalid samples, yet he also testified that it was the operator who stopped the box after P provided two invalid samples. Did the machine need the operator's help to shut off? This testimony was incorrect and the incorrect statement is not found anywhere in the Alcotest training manual. The trooper also testified that "very little needs to be given into that machine as far as to- - fill a liter up- - the - - the Alcotest up with air" and, therefore, petitioner was not trying to give valid samples. This statement too is not found in the training manual and **was the trooper's own conclusion**. P had advanced this argument on appeal.

These misleading and inconsistent statements pertain to the credibility of the witness. Certainly, if the State bears

the burden of proof and the defendant is presumed innocent until the substantive charge is proven beyond a reasonable doubt, a test of credibility is necessary. Fundamental rights of all citizens must be scrupulously protected in all courts. Consequently, critical analysis of the witness' interests, motive, and demeanor is important and examination of the objective reasonableness of the testimony is also highly probative. In addition, the fact-finder must not only make the necessary observations of all the elements required for an assessment of credibility but also must articulate those findings in detail in the record. State v. Locurto, 57 N.J. 463, (1999). (quoting Curtis v. Finneran, 83 N.J. 563, 569 (1980) (finding in a non-jury civil action, trial court's role of finding facts and stating conclusions of law is not satisfied with naked conclusions); See also State v. Sisti, 209 N.J. Super. 148, 151 (App.Div. 1986) (stating that Municipal Court's failure to make findings as to credibility of witnesses and as to proofs of guilt without breathalyzer is unfair to both parties). It is noted that the lower courts made no credibility findings. However, an impartial view of the officer's testimony and inconsistent written statements results in the determination that it lacks sufficient reliability to be accepted as a basis for satisfying the requirement that the State prove the charge beyond reasonable doubt. To preserve the constitutional rights of individuals and the integrity of our judicial system, our courts should not appear as if they are rubber stamping testimony of law enforcement officers as a basis for convictions. No less than meaningful review of the testimony offered by the police is required. Here, there was no overwhelming evidence of P's guilt. Evidence that suggested P's guilt was based largely on the testimony of a witness who provided conflicting written and oral statements about what occurred over a year apart. On the basis of these facts, P argued that the operator had "potentially relevant testimony" (Chun, p.118) that required his presence in the courtroom in order to explain any

inconsistency and that it was prejudicial to substitute the trooper for the operator.

In our jurisprudence, a defendant's day in court carries with it the right to an independent judicial evaluation of the testimony of all witnesses, which was woefully lacking. The required scrutiny was absent not only in the Municipal Court proceedings, but also in the trial de novo at the Law Division and on appeal to the appellate court. State of New Jersey v. Locurto, 304 N.J. Super. 514.

A defendant in a DWI prosecution is entitled to vigorously cross-examine all aspects of the breath machine. See, California v. Trombetta, 467 U.S. 479, 490, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). [A]s to operator error, the defendant retains the right to cross-examine the law enforcement officer who administered the Intoxiolyzer test, **not a substitute**, and to attempt to raise doubts in the mind of the fact-finder whether the test was properly administered. Id. Lastly, under the Due Process Clause, "criminal prosecutions must comport with prevailing notions of fundamental fairness." Id. 485. The U.S. Supreme Court has "long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity t o present a complete defense." Id.

Would not everyone surmise that the rationale behind the decision to ignore the petitioner's repeated requests was that the petitioner was merely an ordinary person or unrepresented foreign immigrant (call him David) defending himself against allegations of wrongdoing brought by the State (call the State Goliath)? Certainly, the courts are required to interpret the law correctly and not to provide any misinformation to induce a guilty plea. And, the Law Division's failure to honor its promise to "consider and address" the Municipal court's interpretation of the informed consent law, **despite such notice** and despite having agreed in open court that that court misinterpreted the law, had the practical effect of concealing from the

parties the principal issue that should have been decided at the de novo trial. The courts were also required to ensure that the State bore the burden of proving its case beyond a reasonable doubt in order to obtain a conviction in the instant case. These requirements were also ignored.

CONCLUSION

Respect for the role and importance of all New Jersey courts, including its Supreme Court, and for this Court's obligation to review the adherence of those courts to the legal principles governing the United States jurisprudence, not some disagreement with findings, is what leads this court to remand or to reverse when the guiding principles are permitted not to be followed. In the instant case, the supreme court of New Jersey sanctioned the petitioner's conviction and sentence which was not a product of conscientious application of the controlling legal principles. There was deviation from the legal principles that is sufficiently apparent to provide a principled basis to conclude that petitioner's conviction is shocking to the judicial conscience. The Order is repugnant to the United States Constitution, and will affect thousands of drivers who would be similarly situated, and is worthy of review by this Court. Petitioner respectfully petitions for Writ of Certiorari to the Supreme Court of New Jersey in State v. Francis Osei-Afriyie, C-566 (September Term 2009) 064920. [1]

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[1] Word count is 8,397.

Dated: 4/20/2010

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